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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MILA IRAKUNDA,

Defendant and Appellant.

D074094

(Super. Ct. No. SCD275129)

APPEAL from a judgment of the Superior Court of San Diego County, Joseph P. Brannigan, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Craig H. Russell, Melissa Mandel and Tami Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found Mila Irakunda guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and found true allegations he personally used a deadly and dangerous weapon (Pen. Code, § 1192.7, subd. (c)(23)) and he personally inflicted great bodily injury on the victim (Pen. Code, §§ 1192.7, subd. (c)(8), 12022.7 subd. (a)). The court sentenced him to seven years in prison. The court also imposed a restitution fine of \$2,100 (Pen. Code, § 1202.4, subd. (b)); a corresponding parole revocation fine of \$2,100 (Pen. Code, § 1202.45), which the court stayed unless parole is revoked; a court facilities assessment of \$30 (Gov. Code, § 70373); a court operations assessment of \$40 (Pen. Code, § 1465.8); and a booking fee of \$154 (Gov. Code, § 29550.1).

Irakunda contends we must reverse the judgment because the court did not, on its own motion, instruct the jury with CALCRIM No. 3471 (CALCRIM 3471) relating to the right to self-defense in the context of mutual combat. In addition, relying on the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Irakunda contends we must stay the restitution fine and vacate the other fine, fee, and assessments because the court violated his due process rights by imposing them without first determining he had the present ability to pay to them.

We conclude Irakunda has forfeited both contentions. Accordingly, we affirm the judgment.

II

BACKGROUND

A

According to the prosecution's evidence, Irakunda gave the victim a watch in exchange for a speaker. Two weeks later, Irakunda contacted the victim and asked to meet with him. Irakunda drove to the victim's location and the victim got into Irakunda's car. Irakunda told the victim he wanted to switch watches and give the victim a different watch. The victim told Irakunda he would return the watch if Irakunda returned the speaker.

They drove around for about an hour as Irakunda tried to acquire a speaker like the one the victim had traded for the watch. After a while, when Irakunda could not find a speaker like the victim's, the two men began arguing because the victim refused to give Irakunda the watch.

Irakunda stopped the car and told the victim to get out. When the victim refused to do so, Irakunda opened the car door, grabbed the victim's leg, and tried to pull him out of the car, while hitting the victim's feet with a hand tool. The victim got out of the car and the two men started fighting. Irakunda told the victim he was going to teach the victim a lesson.

The victim picked up a lightweight, plastic pipe from the ground to keep Irakunda away. The victim did not try to hit Irakunda with the pipe. Irakunda went to the car and retrieved a military-style knife. The victim started backing up and dropped the pipe. Irakunda rushed to within two feet of the victim and swung the knife, leaving a four-inch

gash in the victim's left arm. As the victim retreated with his arms raised and hands open, Irakunda kept coming toward the victim with the knife, stating he needed the watch, he would not leave without it, and he would "finish" the victim if the victim did not give it to him. The victim took off the watch and threw it to the ground. Irakunda picked up the watch, ran back to his car, and left.

The victim lost a lot of blood from his arm injury and become dizzy. Treating the injury required surgery and a three- to four-day hospital stay. Because of the injury, the victim could not move his fingers for a month.

B

According to Irakunda's evidence, the victim stole a watch with a blue wristband from Irakunda's car. Irakunda told the victim he wanted the watch back because it matched his shoes and offered to sell the victim a different watch. The victim refused to return the watch.

The victim had previously borrowed Irakunda's car and afterwards Irakunda noticed the car and its radio were damaged. The victim lent Irakunda a speaker, which someone subsequently stole. The victim refused to pay to repair the car until Irakunda returned the speaker. He also refused to give the watch back because Irakunda had not returned the speaker.

On the night of the incident, Irakunda picked up the victim and they went to a park intending to buy a replacement speaker. They did not end up buying a speaker because the victim thought the replacement speaker Irakunda found was too small.

After the errand, Irakunda asked the victim for the watch, but the victim refused to return it. Irakunda tried to take the watch from the victim and the victim punched Irakunda in the face. Irakunda and the victim began fighting inside the car. The victim got out of the car and grabbed a knife. They struggled as Irakunda tried to take the knife from the victim. Irakunda twisted the victim's hand, the victim dropped the knife, and Irakunda kicked the knife away.

The men continued fighting. Then, the victim ran away and Irakunda chased him. The victim picked up a three-foot-long metal pipe and hit Irakunda with it several times. Irakunda ran back to the knife and picked it up. The victim hit Irakunda's hands, causing the knife to fall to the ground. The victim kept hitting Irakunda with the pipe until Irakunda put the victim in a bear hug, at which point the victim fell backwards and Irakunda took the pipe.

The victim suggested they stop fighting and offered Irakunda the watch, throwing it to the ground. Irakunda took the watch and suggested they leave because someone was calling the police. The victim declined to go with Irakunda. Irakunda left after the victim said he was going to get his gun and come looking for Irakunda.

Irakunda did not see any blood and did not know the victim was injured. He also did not know how the victim became injured or whether he touched the victim with the knife.

C

According to the prosecution's rebuttal evidence, Irakunda never told the police detective who interviewed him about the incident that the victim beat him with a pipe or

threatened him with a gun. Rather, Irakunda told the detective the victim was the one with the knife, but since Irakunda was bigger and stronger, he was able to take the knife from the victim, set it down, retrieve the watch, and walk away. He also told the detective he thought the victim stabbed himself. He denied ever punching, hitting, slashing, or stabbing the victim.

III

DISCUSSION

A

1

During the jury instruction conference, the prosecutor proposed instructing the jury with CALCRIM 3471. This instruction would have informed the jury, "A person who (engages in mutual combat/ [or who] starts a fight) has a right to self-defense only if: [¶] 1. (He/She) actually and in good faith tried to stop fighting; [¶] [AND] [¶] 2. (He/She) indicated, by word or by conduct, to (his/her) opponent, in a way that a reasonable person would understand, that (he/she) wanted to stop fighting and that (he/she) had stopped fighting(;/.) ... [¶] [AND] [¶] 3. (He/She) gave (his/her) opponent a chance to stop fighting.] [¶] If the defendant meets these requirements, (he/she) then had a right to self-defense if the opponent continued to fight. [¶] [However, if the defendant used only non-deadly force, and the opponent responded with such sudden and deadly force that the defendant could not withdraw from the fight, then the defendant had the right to defend (himself/herself) with deadly force and was not required to try to stop fighting(/ or) communicate the desire to stop to the opponent[, or give the opponent a

chance to stop fighting].] [¶] [A fight is *mutual combat* when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose.]" (CALCRIM 3471.)

Defense counsel objected to the instruction, arguing the instruction was a defense instruction, she did not request the instruction, and the instruction was inconsistent with the defense theory of the case. After reviewing the bench notes for the instruction, the court declined to give the instruction.

2

Notwithstanding defense counsel's objection, Irakunda contends we must reverse the judgment because the court failed to give the instruction on the court's own motion. "We review a claim of instructional error de novo. [Citation.]" (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1378)

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).)

"In the case of *defenses*, ... a sua sponte instructional duty arises 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.] Thus, when the trial court believes "there is substantial

evidence that would support a *defense* inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.' [Citation.]" (*Breverman, supra*, 19 Cal.4th at p. 157.)

Here, the defense theory of the case was that Irakunda acted in reasonable self-defense and the victim's injury was the accidental or incidental result of Irakunda's reasonable self-defense. Defense counsel objected to the CALCRIM 3471 instruction because Irakunda was not relying on a mutual combat defense and defense counsel considered the instruction inconsistent with the defense theory of the case. " 'When a defense attorney makes a "conscious, deliberate tactical choice" to [request or] forego a particular instruction, the invited error doctrine bars an argument on appeal that the instruction was [given or] omitted in error.' [Citations.]" (*People v. McKinnon* (2011) 52 Cal.4th 610, 675.) Consequently, Irakunda has forfeited his challenge to the court's failure to give the CALCRIM 3471 instruction.

Although "a defendant who is barred from raising instructional error by the invited error doctrine may 'always claim he received ineffective assistance of counsel[,]' " ... [¶] ... the defendant must show that there was no rational tactical purpose for counsel's act or omission, and that it is reasonably probable that, absent counsel's deficiencies, a more favorable result would have been obtained. [Citations.]" (*People v. Wader* (1993) 5 Cal.4th 610, 658.) Irakunda cannot make this showing because the CALCRIM 3471 instruction limits the availability of self-defense. (See, e.g., *People v. Rogers* (1958) 164 Cal.App.2d 555, 558 [concluding mutual combat instruction caused the jury to reject all claims of self-defense and prejudiced the defendant].) Since self-defense was the defense

theory of the case and defense counsel did not want to undermine that theory, defense counsel had a rational tactical purpose for objecting to the CALCRIM 3471 instruction.

B

As part of Irakunda's sentence, the court imposed a restitution fine of \$2,100; a corresponding parole revocation fine of \$2,100, which the court stayed unless parole is revoked; a court facilities assessment of \$30; a court operations assessment of \$40; and a booking fee of \$154. Relying on the recent decision in *Dueñas*, *supra*, 30 Cal.App.5th 1157, Irakunda requests we stay the fines and vacate the fee and assessments because the court violated his due process rights by imposing them without first determining he had the present ability to pay to them.

We conclude Irakunda has forfeited this issue by failing to object to the fines, fee, and assessments on this basis at the sentencing hearing. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155, but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [no forfeiture because *Dueñas* announced a new, unanticipated constitutional principle]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [no forfeiture because the holding in *Dueñas* was an unforeseeable change in the law].) Since the court imposed more than the minimum restitution fine, Irakunda had an incentive and the ability to object to the imposition of the fine based on his inability to pay. (Pen. Code, § 1202.4, subd. (c); *Gutierrez*, at p. 1033; *Frandsen*, at pp. 1153–1154.) He could have made the same objection to the other fine, the fee, and the assessments. (*Frandsen*, at pp. 1154–1155.) By remaining silent, he forfeited his challenge to the

fines, fee, and assessments. (*Gutierrez*, at p. 1033; *People v. Frandsen*, at pp. 1153–1155.)

IV

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.